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9
10 UNITED STATES DISTRICT COURT
11
12 CENTRAL DISTRICT OF CALIFORNIA

13 WALTER HOPGOOD, individually
and on behalf of all other similarly
situated,

14 Plaintiff,

15 v.

16 EXPERIAN INFORMATION
17 SOLUTIONS, INC., a corporation,

18 Defendant.

19 Case No. 8:22-cv-01400-JWH-ADS
20 Assigned to: John W. Holcomb

**MEMORANDUM OF LAW IN
SUPPORT OF EXPERIAN
INFORMATION SOLUTIONS,
INC.'S MOTION TO COMPEL
ARBITRATION**

21 Date: December 9, 2022
22 Time: 9:00 a.m.
23 Place: Courtroom 9D

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INTRODUCTION

This is a putative class action arising out of an alleged data breach. The plaintiff, Walter Hopgood, claims that information in his “Experian CreditWorks Basic consumer account” was “repeatedly accessed and stolen by an unauthorized cybercriminal resulting in his identity being stolen.” He alleges that defendant Experian Information Solutions, Inc. (“EIS”) is responsible for this unlawful activity. He claims EIS’s conduct violated: (1) the Fair Credit Reporting Act (“FCRA”), and (2) California’s Unfair Competition Law (“UCL”). He also pleads a claim for unjust enrichment. He seeks to represent a nationwide class of similarly-situated individuals. Although the claims lack merit, EIS elects to adjudicate them in arbitration.¹

As he pleads in the complaint, Hopgood is a member of CreditWorks—an online credit monitoring product that is provided by EIS’s affiliate, ConsumerInfo.com, Inc. (which does business as Experian Consumer Services (“ECS”)). His CreditWorks membership predates the filing of this lawsuit. When Hopgood enrolled in CreditWorks, he agreed to the Terms of Use governing that service. That contract contains an arbitration agreement. The Arbitration Agreement defines “ECS” to include its “affiliates.” During the entire time that Hopgood has been enrolled in CreditWorks, EIS has been an affiliate of ECS. The Arbitration Agreement provides that Hopgood and “ECS”—which, again, is defined under the contract to include EIS—agreed to arbitrate “all disputes and claims

¹ None of the claims pleaded in the complaint can withstand a pleadings challenge. A data breach cannot give rise to a violation of the FCRA. See, e.g., *In re Experian Data Breach Litigation*, Case No. SACV 15-1592 AG (DFMx), 2016 WL 7973595, at *2 (C.D. Cal. Dec. 29, 2016) (dismissing the identical FCRA claims that Hopgood pleads here with prejudice). Hopgood, a resident of Oregon, lacks standing to pursue a claim under the UCL. *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 917-18 (C.D. Cal. 2011) (“Plaintiffs’ claims under the UCL and CLRA are dismissed because these California statutes cannot provide relief for non-California residents who cannot allege a sufficient connection to California.”). Finally, “California does not recognize a separate cause of action for unjust enrichment.” *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 132–33 (N.D. Cal. 2020) (collecting California and federal cases). In the event that this matter is not compelled to arbitration, EIS will bring a motion for judgment on the pleadings.

1 between us” that arise out of, or relate to, his CreditWorks membership on a non-
2 class basis. As a party to the Arbitration Agreement contained therein (by virtue of
3 how ECS is defined), EIS may directly enforce the arbitration provision. At a
4 minimum, however, EIS is a third-party beneficiary of the contract.

5 While the Arbitration Agreement that Hopgood agreed to delegates “all
6 issues” to an arbitrator—including all questions regarding arbitrability,
7 enforceability and scope, *see Sauer v. Experian Information Solutions, Inc.*,
8 Case No. 8:21-cv-00963-JLS-DFM (C.D. Cal. May 12, 2022) (Staton, J.) Dkt.
9 No. 49—Hopgood’s claims fall within the scope of the arbitration clause, as they
10 are expressly grounded upon information allegedly stolen from his CreditWorks
11 account. In *Coulter v. Experian*, the court granted EIS’s motion to compel
12 arbitration, upholding the enforceability of the arbitration clause in the CreditWorks
13 Terms of Use. *See Coulter v Experian Information Solutions, Inc.*, 2021 WL
14 735726 (E.D. Pa. Feb. 25, 2021). The court in *Roberson v. Experian* did the same.
15 *See Roberson v. Experian Information Solutions, Inc.*, SA-21-CV-00316-JKP, 2022
16 WL 62270 (W.D. Tex. Jan. 5, 2022) (“Plaintiff agreed to arbitrate its claims against
17 ECS, as well as its parent entities, subsidiaries, and affiliates. It is undisputed that
18 ECS is an affiliate of Experian.”). So did the court in *Stephens v. Experian*. *See*
19 *See Stephens v. Experian Information Solutions, Inc.*, ---F. Supp. 3d---, 2022 WL
20 2716177, at *1 (D. Haw. July 13, 2022) (“Because Stephens’s FRCA claims are
21 covered by a valid arbitration agreement, this court grants the motion and dismisses
22 this case.”). This Court should now rule in the same manner.

23 Thus, under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, EIS respectfully
24 moves for an order compelling this matter to arbitration on an individual (non-class)
25 basis, as required under Hopgood’s written agreement, and staying this action until
26 arbitration has been completed.

27
28

STATEMENT OF FACTS

2 On April 5, 2020, Hopgood enrolled in CreditWorks. See accompanying
3 Declaration of David Williams (“Williams Decl.”), ¶ 3; see also ECF No. 1
4 (“Cmplt.”), ¶ 12 (alleging Hopgood is a CreditWorks member). In order to
5 successfully enroll, Hopgood had to complete a single webform. *Id.* and Ex. 1. The
6 form required Hopgood to enter his personal information—*i.e.*, his name, address,
7 phone number, and e-mail address. *Id.* After he entered his personal information,
8 Hopgood had to click the “Create Your Account” button on the webform in order
9 to enroll. *Id.* Immediately below the boxes to enter his e-mail address and
10 password, was the following disclosure: “By clicking “Create Your Account”: I
11 accept and agree to your Terms of Use Agreement, as well as acknowledge receipt
12 of your Privacy Policy and Ad Targeting Policy.” *Id.*

The phrase “Terms of Use Agreement” in the disclosure was off-set in blue text and, if clicked, would have presented the consumer with the full text of the agreement. *Id.*, ¶ 4. That is, the phrase “Terms of Use Agreement” in the disclosure was a full text hyperlink to the Terms of Use. *Id.* Thus, before clicking the “Create Your Account” button, the consumer could view the entire text of the Terms of Use Agreement by clicking on the blue-highlighted hyperlink “Terms of Use Agreement.” *Id.* When a consumer clicked on the “Terms of Use Agreement” hyperlink, an additional window would open within the consumer’s web browser containing the entire text of the Terms of Use Agreement. *Id.* Immediately below the disclosure was a large purple button that reads: “Create Your Account.” The webform, the disclosure, and the “Create Your Account” button appeared on a single webpage. *Id.*

25 After entering his information, Hopgood clicked the “Create Your Account”
26 button, thereby accepting and agreeing to the Terms of Use Agreement. *Id.*, ¶ 5.
27 Hopgood would not have been able to successfully enroll in CreditWorks unless he
28 clicked that button. *Id.* A true and correct copy of the Terms of Use that was in

1 effect when Hopgood enrolled in CreditWorks is attached as Exhibit 2 to the
2 Williams Declaration. After enrolling, Hopgood has continuously used his service,
3 including after the current version of the Terms of Use came into effect. *Id.*, ¶ 8.
4 A true and correct copy of the current (operative) version of the Terms of Use
5 Agreement is attached as Exhibit 6 to the Williams Declaration.²

6 Every version of the Terms of Use Agreement in effect during Hopgood's
7 enrollment has a section entitled, "Amendments," which advised him that he would
8 be bound by the then-current Terms of Use each time he "order[ed], access[ed], or
9 use[d]" any of the Services or Websites described in the agreement: "Each time you
10 order, access or use any of the Services or Websites, you signify your acceptance
11 and agreement, without limitation or qualification, to be bound by the then current
12 Agreement." *Id.*, ¶ 9. While all versions of the Terms of Use allowed Hopgood to
13 opt-out of amendments to the arbitration clause, at no time did he ever reject any
14 changes that were made. *Id.*

15 Every version of the Terms of Use that was in effect during Hopgood's
16 enrollment in CreditWorks contains an Arbitration Agreement, which requires him
17 to litigate, among other things, all claims against "ECS" that "relate to" or "arise
18 out of" his membership in arbitration on a non-class basis. *Id.*, ¶ 10. The Arbitration
19 Agreement defines "ECS" to include its "parent entities, subsidiaries, [and]
20 affiliates . . ." *Id.* and Ex. 6. So does the "Overview and Acceptance of Terms"
21 section of the contract. *Id.* During the entire time that Hopgood has been enrolled
22 in CreditWorks, EIS has been an affiliate of ECS. *Id.* By including EIS (an affiliate)
23 within the definition of "ECS," the Terms of Use make EIS a party to the contract,
24 as well as a party to the Arbitration Agreement contained within that contract. *Id.*
25 Moreover, by including EIS within the "Overview and Acceptance of Terms"

26

27 ² On May 16, 2022, Plaintiff's account was terminated due to fraud concerns. *Id.*, ¶ 6.
28 He nonetheless re-enrolled in CreditWorks approximately two weeks later (on May 28, 2022) and,
in order to do so, re-accepted the Terms of Use. *Id.*, ¶¶ 6-8 and Exs. 3-5.

1 section, as well as within the definition of ECS in the Arbitration Agreement, the
2 parties intended for EIS to benefit under the contract. *Id.* Additionally, the
3 Arbitration Agreement expressly incorporates the AAA rules. *Id.*

4 At all times relevant to this action, EIS contributed to the services that
5 CreditWorks subscribers receive by providing regular access to how information
6 appears in their EIS credit files, including changes to their credit file information.
7 *Id.*, ¶ 11. Further, all CreditWorks subscribers are required to provide written
8 authorization under the FCRA to obtain their credit report and/or credit score(s) on
9 a recurring basis from EIS through CreditWorks. *Id.* The Terms of Use cover the
10 provision of “Services,” which is defined to include services to which EIS
11 contributed as the provider of credit information—including CreditWorks and the
12 provision of “credit report(s), credit risk score(s), credit monitoring, credit score
13 monitoring and credit score tracking (including all the data and information
14 contained therein), the receipt of any alerts notifying [consumers] of changes to the
15 information contained in [their] credit report(s).” *Id.*

16 **LEGAL ARGUMENT**

17 **I. THE COURT SHOULD COMPEL THIS MATTER TO ARBITRATION**

18 Section 2 of the FAA mandates that binding arbitration agreements in
19 contracts “evidencing a transaction involving commerce . . . shall be valid,
20 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for
21 the revocation of any contract.” 9 U.S.C. § 2. This provision “reflect[s] both a
22 ‘liberal federal policy favoring arbitration’ and the ‘fundamental principle that
23 arbitration is a matter of contract,’” such that “courts must place arbitration
24 agreements on an equal footing with other contracts and enforce them according to
25 their terms.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

26 Pursuant to the FAA, arbitration must be compelled where, as here: (1) a valid
27 agreement to arbitrate exists; and (2) the arbitration agreement encompasses the
28 claims at issue. *See Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126,

1 1130 (9th Cir. 2000). An arbitration agreement governed by the FAA is presumed
2 to be valid and enforceable. *Shearson/Am. Express v. McMahon*, 482 U.S. 220,
3 226 (1987). There is a presumption in favor of arbitrability, *AT&T Tech., Inc. v.*
4 *Communications Workers of America*, 475 U.S. 643, 650 (1986), and the party
5 seeking to evade arbitration bears the burden of showing that the arbitration
6 provision is invalid or does not encompass the claims at issue. *Green Tree Fin.*
7 *Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

8 **A. A Valid Agreement to Arbitrate Exists**

9 Courts within this Circuit routinely enforce internet agreements where the
10 user is required to affirmatively acknowledge the agreement before proceeding with
11 use of the website. *See, e.g., Lee v. Ticketmaster, LLC*, 2019 WL 9096442, at *1
12 (N.D. Cal. April 1, 2019), aff'd 817 Fed. Appx. 393 (9th Cir. 2020) ("Ticketmaster
13 provided notice of the terms of use adjacent to the 'Place Order' button, included a
14 hyperlink to the terms in a contrasting color, and informed the user that 'continuing
15 past this page' (i.e., placing an order) would indicate assent to the terms.").

16 As a matter of law, Hopgood agreed to the Terms of Use Agreement because:
17 (1) he had clear notice of the Terms of Use at the time he enrolled, (2) he was
18 admonished that, by clicking an adjacent button, he was agreeing to be bound by
19 the Terms of Use; and (3) he clicked the button, thereby manifesting his assent to
20 the Terms of Use. Numerous courts, under the same or analogous facts, have found
21 that website users were bound by the Terms of Use. *See Coulter*, 2021 WL 735726;
22 *Graf v. Match.com, LLC*, No. CV 15-3911 PA (MRWx), 2015 WL 4263957 (C.D.
23 Cal. July 10, 2015); *Crawford v. Beachbody, LLC*, No. 14-cv-1583-GPC (KSC),
24 2014 WL 6606563 (S.D. Cal. Nov. 5, 2014); *Fteja v. Facebook, Inc.*, 841 F. Supp.
25 2d 829, 837 (S.D.N.Y. 2012); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d
26 904, 911 (N.D. Cal. 2011).

27 **B. EIS May Directly Enforce The Arbitration Agreement**

28 In the traditional world of paper contracts, it is usually easy to tell who the

1 parties to an agreement are—you just look at the signature lines. With online
2 consumer contracting, however, the matter is sometimes more complicated. Online
3 entities often work closely with a number of affiliated corporate entities to provide
4 customers with a single integrated service, and there is often no signature line to
5 consult in the Terms of Use that result from these interactions. Nonetheless, the
6 hornbook principles of contract law remain: the parties to a contract are those who
7 agreed to be bound by its obligations. *See, e.g.*, Williston on Contracts § 1.1
8 (defining a “contract” as “a promise or set of promises for breach of which the law
9 gives a remedy”) (4th ed. May 2021 Update); *id.* § 1.2 (defining a “promise” as a
10 commitment between a promisor and a promisee); Restatement (Second) of
11 Contracts §§ 1, 2 (same).

12 Under these principles, EIS’s status as a party to the Arbitration Agreement
13 is beyond dispute. To start, the “Overview and Acceptance of Terms” section under
14 the current version of the Terms of Use defines ECS to include its affiliates, such as
15 EIS. Williams Decl., Ex. 6. The Arbitration Agreement contained within the Terms
16 of Use does the same. *Id.* Indeed, the Arbitration Agreement includes a
17 straightforward, bilateral promise: “ECS and you agree to arbitrate all disputes and
18 claims between us arising out of or relating to this Agreement to the maximum
19 extent permitted by law[.]” *Id.* And all versions of the Arbitration Agreement
20 clearly identify the promisors and promisees—that is, the parties—with respect to
21 that promise: “For purposes of this arbitration provision, references to ‘ECS,’
22 ‘you,’ and ‘us’ shall include our respective parent entities, subsidiaries,
23 affiliates. . . .” *Id.* As an affiliate of ECS, EIS is swept within the definitions of
24 “ECS” and “us” under the Arbitration Agreement, and thus qualifies as a promisee
25 (and promisor) entitled to enforce the Arbitration Agreement that Plaintiffs entered.

26 There is nothing surprising about this result. Courts routinely have held that
27 materially identical language creates a binding contract enforceable by the parties
28 identified as making promises with each other. For example, in *Roberson v.*

1 *Experian*—a recent case which involved the same Terms of Use at issue here—the
2 court held that plaintiff “agreed to arbitrate its claims against ECS, as well as its
3 parent entities, subsidiaries, and affiliates.” *Roberson v. Experian Information*
4 *Solutions, Inc.*, SA-21-CV-00316-JKP, 2022 WL 62270, at *4 (W.D. Tex. Jan. 5,
5 2022). The court further noted “[i]t is undisputed that ECS is an affiliate of
6 Experian.” *Id.* Consequently, the court granted EIS’s motion to compel arbitration.

7 Courts throughout the country are in accord. In *George v. Rushmore Service*
8 *Center, LLC*, 18-cv-13698, 2020 WL 2319293, at *2 (D.N.J. May 11, 2020), the
9 court, in granting the motion to compel arbitration, explained that, under the
10 contract, “arbitration [wa]s mandatory for claims by ‘you or us,’ which explicitly
11 includes FPB and ‘the employees, parents, subsidiaries, affiliates, beneficiaries,
12 agents and assigns of you and us.’” The court in *Clemons v. Midland Credit*
13 *Management, Inc.*, 1:18-cv-16883-NLH-AMD, 2019 WL 3336421, at *3-4 (D.N.J.
14 July 25, 2019), on similar facts, held the same. The court *Belyea v. GreenSky, Inc.*,
15 Case No. 20-cv-01693-JSC, 2021 WL 1338552 (N.D. Cal. Apr. 9, 2021), likewise
16 granted the motion to compel arbitration because the contract specified that
17 “Claims . . . that arise between you and us will be resolved through binding
18 arbitration,” and the contract defined “us” to include “any corporate parent, wholly
19 or majority owned subsidiaries, affiliates, . . . and any third party providing any
20 product, service or benefit in connection with the Agreement.” 2021 WL 1388552,
21 at *2–3. The court rejected the plaintiff’s argument that GreenSky, the loan
22 servicer, could not enforce the agreement as a party—holding that because
23 GreenSky “f[e]ll within the Arbitration Provision’s definition of ‘us,’” it qualified
24 as a “party” that could “move to compel arbitration.” *Id.* at *3; *see also Sanzone-*
25 *Ortiz v. Aetna Health of California, Inc.*, No. 15-cv-03334-WHO, 2015 WL
26 9303993, at *6 (N.D. Cal. Dec. 22, 2015) (dismissing plaintiff’s argument that the
27 defendant was not a party to the arbitration agreement because the plaintiff’s
28 “limited reading of the agreement ignore[d] that the arbitration provision applies

³ to . . . affiliates as well.”) *Id.* at *6.³

In short, by disclosing to users they are agreeing to arbitrate with ECS's affiliates, and requiring affirmative action by Hopgood to assent to those terms, Hopgood is bound by the Terms of Use Agreement and its obligation that he arbitrate his claims against EIS. *Roberson*, 2022 WL 62270.

C. At A Minimum, However, EIS Is A Third-Party Beneficiary

Even if the Court were to conclude that EIS cannot directly enforce the Arbitration Agreement as a party thereto, EIS may nonetheless compel arbitration as a third-party beneficiary of the contract.

1. Whether EIS Is A Third-Party Beneficiary Has Been Delegated To An Arbitrator To Decide

If there is any dispute over whether EIS qualifies as a third-party beneficiary, that issue is to be resolved by an arbitrator. By default, the parties to an arbitration agreement are presumed to have left such questions of arbitrability to the courts. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). They may alter this background rule, however, by agreeing to send questions of arbitrability to an arbitrator along with the rest of the underlying dispute. Where the contract “clearly and unmistakably” does so, a court must enforce this distinct agreement by compelling disputes about arbitrability into arbitration. *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986).

Under these principles, courts regularly have sent questions about a third

³ Numerous other decisions on similar facts are in accord. See, e.g., *Ridgeway v. Nabors Completion & Prod. Servs. Co.*, 725 F. App'x 472, 474 (9th Cir. 2018); *Adams v. AT&T Mobility, LLC*, 524 F. App'x 322, 324 (9th Cir. 2013); *Green v. Serv. Corp. Int'l*, 333 F. App'x 9 (5th Cir. 2009); *Wang v. Bear, Stearns & Co.*, 2009 WL 10675213, at *1 (C.D. Cal. Nov. 12, 2009); *Carrillo v. ROICOM USA, LLC*, 486 F. Supp. 3d 1052, 1062 (W.D. Tex. 2020); *Bayco Prod., Inc. v. ProTorch Co., Inc.*, No. 4:19-cv-00648-ALM, 2020 WL 2574626 (E.D. Tex. May 21, 2020); *Harris v. Midland Credit Management, Inc.*, Civil Action No. 15-4453 (SDW)(SCM), 2016 WL 475349, at *2 (D. N.J. Feb. 8, 2016).

1 party's ability to enforce an arbitration agreement against a signatory to an arbitrator
2 for resolution in the first instance. For example, in *Solis v. Experian*, Judge Carney
3 granted EIS's motion to compel arbitration under the CreditWorks Terms of Use,
4 finding that “[t]he Terms of Use are similarly clear that the arbitrator decides ‘scope’
5 issues—*i.e.*, which claims are subject to the agreement.” *Solis v. Experian*
6 *Information Solutions, Inc.*, Case 8:22-cv-00102-CJC-KES (C.D. Cal. Sept. 21,
7 2022) (ECF No. 61). Judge Staton reached the same conclusion, holding that “the
8 dispute over whether Experian is a third-party beneficiary should go to the
9 arbitrator.” *Sauer v. Experian Information Solutions, Inc.*, Case No. 8:21-cv-00963-
10 JLS-DFM (C.D. Cal. May 12, 2022) (ECF No. 49 (“Plaintiff agreed that ‘the
11 arbitrator shall have exclusive authority to resolve any such dispute relating to the
12 scope and enforceability of this arbitration provision or any other term of this
13 Agreement.’”); *see also Stephens*, 2022 WL 2716177, at *6 (“Applying *Brennan [v.*
14 *Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015)], this court concludes that the
15 parties [to the CreditWorks contract] have clearly and unmistakably delegated the
16 issue of arbitrability to the arbitrator.”).

17 Similarly, in *Portland General Electric Co. v. Liberty Mutual Insurance Co.*,
18 PGE had a guaranty contract with Abengoa that included an arbitration clause and
19 provided that, once arbitration began, either side could implead third parties into the
20 arbitration. *See* 862 F.3d 981, 983–84 (9th Cir. 2017). Abengoa initiated an
21 arbitration and impleaded the sureties who would be liable to PGE in the event
22 PGE’s contractor had defaulted (as it claimed and Abengoa disputed). *See id.* at
23 984. PGE filed suit against the sureties in federal court, complaining that it had
24 never agreed to arbitrate with them. *See id.* Although the district court agreed with
25 PGE, the Ninth Circuit did not, finding that, by incorporating rules similar to those
26 found in the AAA, PGE had “delegated to the arbitrators” questions such as
27 “whether PGE ha[d] . . . agreed to arbitrate its dispute against the [s]ureties.” *Id.* at
28 985; *see also Blanton v. Domino’s Pizza Franchising LLC*, 962 F.3d 842, 843–44,

1 852 (6th Cir. 2020) (same); *Eckert/Wordell Architects, Inc. v. FJM Props. of*
2 *Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014) (sending the question of
3 “[w]hether a particular arbitration provision may be used to compel arbitration
4 between a signatory and a non-signatory” to the arbitrator because the arbitration
5 agreement incorporated the AAA Rules); *Worldwide Film Prods., LLC v.*
6 *JPMorgan Chase Bank, N.A.*, CV 19-10337-DSF (JPRx), 2020 WL 2730926, at *2–
7 3 (C.D. Cal. Mar. 13, 2020) (same).

8 Under this precedent, an arbitrator must resolve any doubts about EIS’s
9 ability to compel arbitration as a third-party beneficiary. Not only does the
10 Arbitration Agreement incorporate the AAA rules, *see* Williams Decl., Ex. 6, but
11 the delegation clause broadly provides: “***All issues*** are for the arbitrator to decide,
12 including the scope and enforceability of this arbitration provision[.]” *Id.* (emphasis
13 added). Under these facts, the Ninth Circuit has held that there was clear and
14 unmistakably evidence that the parties agreed to arbitrate arbitrability. *See Portland*
15 *General*, 862 F.3d at 985; *Brennan*, 796 F.3d at 1130. Because the delegation clause
16 in the Arbitration Agreement sends gateway questions of arbitrability to the
17 arbitrator, any question about EIS’s ability to enforce as a third party belong to an
18 arbitrator too. *Stephens*, 2022 WL 2716177, at *6; *Sauer*, Case No. 8:21-cv-00963-
19 JLS-DFM (C.D. Cal. May 12, 2022), Dkt. No. 49.

20 **2. Even If This Court Were To Decide The Question, EIS Plainly**
21 **Is A Third-Party Beneficiary**

22 Under California law, a third party may assert rights under a contract when
23 (1) “the third party would in fact benefit from the contract,” (2) “a motivating
24 purpose of the contract was to provide a benefit to the third party,” and
25 (3) “permitting [the] third party to bring its own breach of contract action against
26 a contracting party is consistent with the objectives of the contract and the
27 reasonable expectations of the contracting parties.” *Goonewardene v. ADP, LLC*,
28 6 Cal. 5th 817, 830 (2019); *see also*, e.g., *Hacohen v. BMW of North America*,

1 *LLC*, Case No. CV 21-0464-MWF (JEMx), 2021 WL 4352364, at *4 (C.D. Cal.
2 July 23, 2021) (applying this test to compel arbitration with a third-party
3 beneficiary).

4 Applying this and equivalent standards, courts have held over and over
5 again that a party named in the arbitration agreement, either directly or as a
6 member of a specified class, can enforce as a third-party beneficiary. *See, e.g.*,
7 *Ronay v. Family Ltd. P'ship v. Tweed*, 157 Cal. App. 4th 830, 838–39 (2013)
8 (allowing a non-party to enforce as a third-party beneficiary because the
9 arbitration agreement “expressly require[ed] arbitration of claims against . . .
10 agents and registered representatives” like the non-party); *Cione v. Foresters
11 Equity Servs., Inc.*, 58 Cal. App. 4th 625, 636–40 (1997) (allowing a non-party
12 to enforce as a third-party beneficiary because the contract between the plaintiff
13 and the regulatory agency compelled him to arbitrate claims against his “firm”);
14 *Lacayo v. BMW of N. Am. LLC*, 2020 WL 3971307, at *1 (N.D. Cal. July 13,
15 2020) (compelling Lacayo to arbitrate his claims against BMW of North America
16 because the arbitration clause in his agreement with BMW Financial Services
17 “explicitly applie[d] to affiliates” like BMW of North America); *Herrera v.
18 Verra Mobility Corp.*, No. CV-20-00515-PHX-DWL, 2020 WL 6781269, at *6
19 (D. Az. Nov. 18, 2020) (allowing ATS Processing and ATS Consolidated to
20 enforce an arbitration agreement because the contract “defined ‘us’ as
21 encompassing vendors and third-party service providers” like them); *Banh v. Am.
22 Honda Motor Co.*, Case No. 2:19-cv-05984-RGK-AS, 2020 WL 5035095, at *5
23 (C.D. Cal. July 28, 2020) (allowing Honda to “invoke the right to the benefits of
24 the arbitration agreements” in question because one of the parties (Acura) was
25 “defined to include Honda”); *Greater N.Y. Mut. Ins. Co. v. Rankin*, 298 A.D.2d
26 263, 263 (N.Y. App. Div. 2002) (third parties may enforce arbitration agreements
27 where “the right of the nonsignatory is expressly provided for in the agreement”);
28 *Fikham v. BMW of North America LLC*, No. 19-03963 VAP, 2019 WL 6721626,

1 at *2 (C.D. Cal. Oct. 15, 2019) (same); *Rizvi v. BMW of North America LLC*,
2 Case No. 5:20-cv-00229-EJD, 2020 WL 2992859, at *2–3 (N.D. Cal. June 4,
3 2020) (same).

4 Under this authority, EIS—which, again, is an “affiliate” defined as part of
5 “ECS” for purposes of the Arbitration Agreement—qualifies as a third-party
6 beneficiary entitled to enforce the Arbitration Agreement. First, EIS clearly is a
7 party that would “benefit from the contract”—including by arbitrating claims
8 against it pursuant to the contract’s express provisions guaranteeing that
9 outcome. *Hacohen*, 2021 WL 4352364, at *5 (explaining that an arbitration
10 agreement allowing enforcement by affiliates meets this standard).

11 Second, by naming EIS as a party that may enforce the Arbitration
12 Agreement, the parties clearly demonstrated their “motivating purpose . . . to
13 provide a benefit to” EIS. *Id.* at *4–5. Why else would the parties specify that
14 “affiliates” fall within ECS for purposes of the Arbitration Agreement?

15 Third, allowing EIS to enforce the Arbitration Agreement here is plainly
16 “consistent with the objectives of the contract and the reasonable expectations of
17 the contracting parties.” *Id.* EIS is “not some random third party.” *Id.* at *5.
18 Instead, EIS plays a significant role in the provision of Services under the Terms
19 of Use, and is mentioned by name over 30 times in the contract. *Id.*, Ex. 3.

20 For these reasons, EIS is a third-party beneficiary, and may compel
21 arbitration.

22 **D. An Arbitrator Is To Decide The Arbitrability Of Plaintiffs’ Claims**

23 If there is any question as to whether Hopgood’s claims fall within the scope
24 of the Arbitration Agreement, that issue also is to be decided by an arbitrator:
25 “All issues are for the arbitrator to decide, including the scope and enforceability of
26 this arbitration provision[.]” Williams Decl., Ex. 6. Where, as here, the parties have
27 clearly and unmistakably agreed that an arbitrator should decide the validity and
28 applicability of an arbitration provision, the FAA “leaves no place for the exercise

1 of discretion by a district court, but instead mandates that district courts shall direct
2 the parties to proceed to arbitration on issues as to which an arbitration agreement
3 has been signed.”” *Chiron*, 207 F.3d at 1130 (citation omitted); *Rent-A-Center,*
4 *West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (same); *Henry Schein, Inc. v. Archer*
5 *and White Sales, Inc.*, 139 S.Ct. 524, 527–30 (2019) (“When the parties’ contract
6 delegates the arbitrability question to an arbitrator, a court may not override the
7 contract.”); *Coulter*, 2021 WL 735726 at *4 (finding that the Terms of Use’s
8 delegation clause “constitutes a ‘clear and unmistakable’ delegation clause under
9 *Henry Schein* and delegates the exclusive authority to resolve ‘all issues’ to the
10 arbitrator, including the ‘scope and enforceability’ of the Arbitration Provision”).
11 In short, because the Terms of Use makes an unambiguous expression of intent to
12 arbitrate arbitrability, any question over whether Plaintiffs’ claims fall within the
13 arbitration clause are for an arbitrator to decide. *Id.*; *Stephens*, 2022 WL 2716177,
14 at *6; *see also Rollins v. United Healthcare Services, Inc.*, No. 2:21-cv-01023-TLN-
15 DMC, 2022 WL 705618, at *2 (E.D. Cal. Mar. 9, 2022) (“Courts within this circuit
16 have previously determined that identical delegation provisions have unmistakably
17 delegated the issue of arbitrability to the arbitrator.”) (citations omitted).

18 **II. THE ACTION MUST BE STAYED PENDING ARBITRATION**

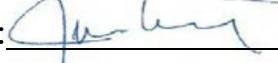
19 Section 3 of the FAA expressly provides that a district court “shall . . . stay
20 the trial of the action until such arbitration has been had in accordance with the terms
21 of the agreement.” 9 U.S.C. § 3. Because Hopgood must be compelled to arbitrate
22 his claims, the action should be stayed pending completion of arbitration.

23 **CONCLUSION**

24 For the foregoing reasons, EIS respectfully requests that the Court grant this
25 Motion, enter an order directing Hopgood to arbitrate his claims against EIS on an
26 individual (non-class) basis, and stay this action pending the completion of
27 arbitration.
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1 Dated: October 26, 2022
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